Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

No. 91-1564

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,
VS.
GUADIYA VAISHNAVA SOCIETY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I	
THE FIRST AMENDMENT DOES NOT CONFER THE RIGHT TO SELL ON THE SIDEWALK COMMERCIAL PRODUCTS WHICH INCIDENTALLY CONVEY A MESSAGE	4
II	
THE INSTANT ORDINANCE DOES NOT IMPINGE UPON FIRST AMENDMENT FREEDOM OF SPEECH	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page
City of Lakewood v. Plainer Publishing Co., 486 U.S. 750, (1988)	8, 9
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 433 U.S. 788 (1985)	4
Gaudiya Vaihnava Soc. v. San Francisco, 952 F.2d 1059 (9th Cir. 1992)	5
Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)	4
San Francisco Street Artists Guild v. Scott, 37 Cal.App.3d 667 (1974)	6
United States v. Albertini, 472 U.S. 675 (1985)	6
U.S. v. American Bar Endowment, 477 U.S. 105 (1986)	7
United States v. O'Brien, 391 U.S. 367 (1968)	5, 6
Veterans of Foreign Wars, Department of Michigan v. Commissioner of Internal Revenue, 89 T.C. 7 (1987)	8
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	4

Statutes

California Constitution, Art. XI, Secs. 3 & 5	1
United States Code, 26, Sec. 511 (a)(1)	7

Rules

Rule 36	1

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BRIEF AMICUS CURIAE OF THE CITY OF LOS ANGELES

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed pursuant to Rule 36 on behalf of the City of Los Angeles. The City of Los Angeles is a municipal corporation operating under a charter adopted pursuant to California Constitution, art. XI, sec. 3. Charter for the City of Los Angeles was adopted in 1889 and has been amended frequently since that time.

The City of Los Angeles is responsible for administering its own Charter and enforcing the Penal Code of the State of California and the Municipal Code of the City of Los Angeles within its jurisdiction. Respondents in this case assert, and the United States Court of Appeal has ruled, that municipalities are without authority to regu-

late the sale of commercial merchandise on public sidewalks when such merchandise bears any message by a religious or advocacy group. This asserted lack of authority would result in unregulated use of sidewalks akin to commercial bazaars without any regard to public health, safety and welfare. Adoption of such a rule would usurp the ability of local government to exercise its police power in such instances and in other situations which, at most, might tangentially impact on First Amendment related activities. For example building and safety code requirements for book and newspaper printers, theaters and bookstores, penal code requirements controlling distribution of drug paraphernalia, and health code requirements controlling manufacture and distribution of food all would be affected. Cities would be prevented from exercising their police power to protect the public in all such instances.

The City of Los Angeles believes that the opinion of the Ninth Circuit improperly enjoins the enforcement of San Francisco's peddling ordinance by restricting the ability of local government to exercise its police power and regulate commercial activity on sidewalks. Thus, the City of Los Angeles urges this Court to accept the petition for writ of certiorari filed by the City and County of San Francisco and to reverse the judgment entered in this case by the Unites States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Brief in the petition for a writ of certiorari is adopted by the City of Los Angeles for purposes of this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Ninth Circuit incorrectly applied the First Amendment to void the San Francisco ordinance which requires that a permit be obtained by sidewalk vendors who attach noncommercial messages to commercial merchandise (excluding books and purely communicative items) that which is vended on city sidewalks.

The opinion of the Ninth Circuit gives sidewalk vendors who append an incidental noncommercial message to commercial merchandise a subterfuge with which to avoid government regulation of any kind, except very limited time, place and manner regulations. The natural consequence of such a ruling is the appending of such messages to any type of merchandise which would otherwise be regulated, thereby avoiding regulation. Under the opinion, food and drugs can be distributed without appropriate health regulation leading to predictable danger to public health. Weapons, bearing messages, could be sold without the necessary government controls. Owners of buildings dedicated to use by an organization which will sell material imprinted with some message will no longer need appropriate permits to operate or to be erected.

The Supreme Court's decisions governing the interplay of the First Amendment and commercial activity have not expanded the scope of activities protected thereby to eliminate all content neutral government regulation. The decision by the Ninth Circuit has given commercial speech which incidentally includes some expressive activity the expansive protection properly afforded only to freedom of speech protected by the First Amendment.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT CONFER THE RIGHT TO SELL ON THE SIDEWALK COMMERCIAL PRODUCTS WHICH INCIDENTALLY CONVEY A MESSAGE.

The Ninth Circuit analogized the vending of merchandise, which incidentally carried a message, to solicitation or fund raising. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980) and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-789 (1988).

Such an analogy ignores the facts of the instant case. The sidewalks of San Francisco are littered with commercial sales which may or may not incidentally carry a message. Vendors are engaging in commercial activity, not in solicitation. Nor is their primary purpose the communication of ideas as it is with solicitation. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* 473 U.S. 788, 797-798 (1985) (quoting *Schaumburg*, 444 U.S. at 632). The sidewalk vendors are engaged in merchandising.

> "[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of information and advocacy would likely cease."
>
> . . . "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech inter-

> ests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Id.*

The freedom to solicit funds as a protected speech under the First Amendment is *not* the issue in this case. The freedom to engage in sidewalk sales free from content neutral regulation is the issue.

The ability to control commercial sales which incidentally bear a message is a proper exercise of the police power of a municipality. The Supreme Court observed in *United States v. O'Brien*, 391 U.S. 367, 376 (1968) that there is not a limitless variety of conduct which can be labeled speech whenever the conduct incidentally expresses an idea. Further, the Court established a four-prong test of the validity of the government regulation when speech and non-speech elements are combined in the same course of conduct. *United States v. O'Brien*, 391 U.S. at 377.

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

The Ninth Circuit recognized that the San Francisco peddling ordinance met three of the four prongs of the *O'Brien* test. *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1992). The Ninth Circuit held that the ordinance was not the least restrictive alternative for advancing the interests sought to be regu-

lated by San Francisco because the police chief is vested with "unbridled" discretion. The Ninth Circuit opined that regulations controlling the police chief would have met the fourth prong of *O'Brien*.

Yet in *United States v. Albertini*, 472 U.S. 675, 689 (1985) the Supreme Court found that the fourth prong of *O'Brien* did not mean that the court should second guess the government in determining the most appropriate means for promoting the government's interest. *United States v. Albertini*, 472 U.S. at 688-689.

Indeed, permit issuing authorities are vested with sound discretion in the issuance of permits. Here, where the issue is a question of *permits to engage* in sidewalk *sales*, the question does not rise to the significance of a pure speech issue under the First Amendment.

> "Delegation of power to a municipal officer to refuse permits to businesses which are subject to police regulation is constitutional, and it is presumed that such authorities have not acted arbitrarily but in the exercise of sound discretion. [Citations.] The granting of discretionary power not restricted by specific standards to confer or deny licenses is to be upheld where the licensed activity, because of it's potentially objectionable character (e.g., traffic obstruction), may be regulated or restricted to certain localities."

San Francisco Street Artists Guild v. Scott, 37 Cal.App.3d 667, 674 (1974). There is no question that sidewalk vending is properly subject to regulation pursuant to the police power of the municipality. A vendor cannot avoid such proper and necessary regulation by merely exhibiting or appending a non-commercial message on the vended item.

In San Francisco, as in any other city, left unregulated, the proliferation of clutter and litter associated with street vendors, create a traffic hazard for pedestrians. The police power of the municipality is essential to control this hazard along with the types of merchandise being vended which could pose a threat to public health, safety or welfare. The peddling ordinance does not impinge upon any First Amendment freedom of speech, it protects the public. Having satisfied all four prongs of *O'Brien*, the peddling ordinance should be found to pass constitutional muster.

II. THE INSTANT ORDINANCE DOES NOT IMPINGE UPON FIRST AMENDMENT FREEDOM OF SPEECH.

The Ninth Circuit improperly has expanded the protection of the First Amendment freedom of expression to speech which heretofore has not been so protected. Commercial merchandising is the only activity regulated by the San Francisco peddling ordinance. The ordinance specifically excludes sales clearly associated with expression from its application.

Conduct which raises income for charitable and religious organizations is subject to income tax if the income is derived from a trade or business which is unrelated to the purpose in granting the organization tax exempt status. 26 U.S.C. section 511 (a)(1). Similarly, the Supreme Court in *U.S. v. American Bar Endowment*, 477 U.S. 105, 110, 119 (1986) found that the tax exempt status of a tax exempt organization did not extend to activities which are not substantially related to the tax exempt status of the organization. Merchandizing by charitable and religious organizations which profess to advance a cause is wholly unrelated to the purpose for which the organization ex-

ists. Rather, the purpose of the sale of merchandise is to generate income.

In *Veterans of Foreign Wars, Department of Michigan v. Commissioner of Internal Revenue,* 89 T.C. 7 (1987), the court found that the sale of Christmas cards by the organization to generate income was subject to taxation. The Internal Revenue Code distinguishes conduct related to the purpose of an organization which is exempt from taxation and conduct which is unrelated to the organization and subject to regulation by taxation. The Internal Revenue Code distinguishes the operation of a trade or business which is tangentially connected to freedom of speech in that it is conducted by a charitable organization and labels such an activity commercial and subject to taxation. Surely San Francisco is entitled to make the same distinction and require the operation of a trade or business, the purpose of which is to generate revenue for the charitable organization, to obtain a peddlers license. Such restriction is far less taxing on the organization than the control imposed by the Internal Revenue Service. Since the Internal Revenue Service can distinguish commercial activity by charitable and religious organizations for regulation under the tax code, there is no reason to prevent local governments from doing so as well in the exercise of its police power.

Similarly, in *City of Lakewood v. Plainer Publishing Co.,* 486 U.S. 750, 760-761 (1988), the Supreme Court distinguished the ability by government to regulate conduct associated with expression and conduct not so associated.

> . . . [L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of expression or the word about to be

spoken, carry with them little danger of censorship." *Id.*

Indeed, the Supreme Court distinguished the newspaper vendor from the soda vendor who engages in speech.

> "Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the Mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or the viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendors ability to speak." *Id.*

The analogous reasoning applies to the instant case. Those selling books, pamphlets, buttons, bumperstickers, posters or other types of items that have no commercial purpose other than to communicate a message do not need to obtain a peddler's permit. The business of speech and the communication of ideas is unaffected by the San Francisco ordinance. The peddler engaged in selling merchandize is in the business of selling, not communicating. The speech associated with the sale of the banana or the T-shirt is the same type of speech associated with the sale of the soda distinguished in *Lakewood* from the sale of newspapers.

Since San Francisco can control the location of a soda vendor who incidentally engages in speech, there is no justification to distinguish the T-shirt vendor who inci-

dentally engages in speech. The activity is the same commercial venture; only the type of merchandise differs.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to accept the petition for writ of certiorari filed by the City and County of San Francisco and to reverse the judgment of the United States Court of Appeal for the Ninth Circuit in this case.

Dated: April 29, 1992

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